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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Applications for Consent to the Transfer)
Of Control of Licenses and Section 214)
Authorization from)
)
AMERITECH CORPORATION,)
Tranferor)
to)
)
SBC COMMUNICATIONS INC.,)
Tranferee)

CC Docket 98-141

COMMENTS OF
ALLEGIANCE TELECOM, INC.

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SUMMARY

On July 1, 1999, SBC Communications and Ameritech filed with the Commission a set of proposed conditions in conjunction with their pending license and authority transfer application ("merger"). These conditions were intended to respond to concerns voiced by the Commission regarding the effects of the proposed merger upon telecommunications competition within the joint SBC-Ameritech region. Allegiance believes that the conditions are insufficient to ensure real parity to competitive providers, and consequently, the conditions fail to adequately guarantee the benefits of competition to consumers. In addition, Allegiance is concerned that the conditions do not provide a clear, consistent set of measurable standards within the SBC-Ameritech region by which the company's actual performance may be gauged. To this end, Allegiance recommends to the Commission the standards and enforcement mechanisms set by the Texas Public Utility Commission and strongly suggests that the Commission adopt those standards throughout the SBC-Ameritech region.

Allegiance further recommends that the Commission impose a meaningful enforcement mechanism upon SBC-Ameritech. For SBC-Ameritech's commitments to be trusted, there must be severe costs to nonperformance. Allegiance is not convinced that the proposed penalties and their implementation mechanism will prove adequate. The merger conditions proposal itself affords the company months and even years to finally fulfill its current obligations for the provisioning of CLECs. A sustained delaying tactic by the company could gain it considerably more time. Allegiance recommends that the Commission implement a tiered

penalty structure which will provide overwhelming incentive for SBC-Ameritech to fulfill its commitments in a complete and timely manner.

Finally, Allegiance believes that the most-favored-nation proposals are so restrictive as to be meaningless. Without explanation or rationale, one clause precludes application to negotiated terms while the next precludes application to arbitrated terms. If SBC-Ameritech is serious in its commitment, it should make available to CLECs in its region the provisions of any approved interconnection agreement, whether negotiated or arbitrated, to which SBC-Ameritech or its CLEC affiliates is a party.

The proposed SBC-Ameritech merger raises a great many concerns for competitive carriers and for the regulatory bodies mandated to foster and protect competition in the telecommunications market to the benefit of consumers throughout the nation. Allegiance believes that the implementation of clear measurable performance standards for SBC-Ameritech, reinforced by a strict enforcement mechanism, will do much to ameliorate many of these concerns. Therefore, Allegiance recommends that the Commission, as a condition of merger approval, require SBC-Ameritech to implement the Texas Public Utility Commission performance standards on a regionwide basis, subject SBC-Ameritech to effective enforcement mechanisms for failure to meet those standards and require SBC-Ameritech to implement a comprehensive most-favored-nations policy that would allow a CLEC to take advantage of provisions in any approved interconnection agreement to which SBC-Ameritech or its CLEC affiliate is a party, whether the agreement is voluntarily negotiated or arbitrated.

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COMMENTS OF ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc., by its attorneys, respectfully submits its comments on the proposed merger conditions filed by the Applicants in the above proceeding.¹

INTRODUCTION

On July 1, 1999, SBC Communications and Ameritech filed with the Commission a set of proposed conditions in conjunction with their pending license and authority transfer application ("merger").² These conditions were intended to respond to concerns voiced by the Commission regarding the effects of the proposed merger upon telecommunications competition within the joint SBC-Ameritech region. Allegiance acknowledges the time and effort expended

¹ The absence of comment on any particular condition should not be interpreted as agreement with that condition or as agreement that, overall, the conditions are sufficient.

² *"Proposed Conditions for FCC Order Approving SBC/Ameritech Merger,"* submitted July 1, 1999, (*"Proposed Conditions"*).

developing these conditions and appreciates the extent to which they stand to forward the cause of competition. However, Allegiance also believes that the conditions are insufficient to ensure real parity to competitive providers, and consequently, the conditions fail to adequately guarantee the benefits of competition to consumers. In addition, Allegiance is concerned that the conditions do not provide a clear, consistent set of measurable standards within the SBC-Ameritech region by which the company's actual performance may be gauged. Moreover, performance standards, however clear and comprehensive, will be worthless in the absence of real enforcement mechanisms. There must be meaningful costs to noncompliance. To this end, Allegiance recommends to the Commission the standards and enforcement mechanisms set by the Texas Public Utility Commission and strongly suggests that the Commission adopt those standards throughout the SBC-Ameritech region.

I. THE SBC-AMERITECH PROPOSED MERGER CONDITIONS ARE INADEQUATE AND UNRELIABLE

Allegiance agrees that the SBC-Ameritech merger conditions document contains many elements necessary to implement effective competition throughout the incumbent's region. Unfortunately, the document fails to include many standards and timelines that are critical to competitive providers. Adoption of an incomplete set of conditions will lead all too swiftly to the conclusion that nothing more is required nor can be reasonably expected of the incumbent. The vitality of the included standards will be sapped by the absence of supporting conditions and requisite components. That, in turn, will at best complicate and more likely cripple the continued development of competition in this region.

A. The Proposed Performance Standards are Incomplete and Inadequate

The deficiencies in the proposed conditions take several forms. First, the conditions leave a number of key components unaddressed. The operations support systems (“OSS”) provisions are far from comprehensive. The time measures for performance are selective. Illustrative of the latter point, the proposal includes a percentage measure of installation and repair due dates missed, but no measure of average time from request to completion. Similarly, there is no measure of time from request for collocation space to delivery, nor is there a clear specification as to what constitutes fully-delivered collocation space. At a minimum, considerably more detail is required with respect to all aspects of OSS, associated performance measures, timelines and specifications for completion. Realistically, a comprehensive set of measures and timetables should be adopted to address the full range of issues which arise with respect to appropriate provisioning to competitive providers.

Second, the proposed standards are insufficient to ensure adequate performance by SBC once the regulatory spotlight is dimmed. For example, SBC commits to provide a collocation compliance plan and proposes to have its performance audited for eight months following the merger closing date.³ The audit will be effectively under SBC’s auspices and no other audit shall be performed for twelve months following the merger closing date. Given the critical role which collocation plays for competitive providers, as well as the disturbingly consistent history of BOC resistance to every incremental improvement in collocation methods, Allegiance is greatly concerned by this plan. Collocation is absolutely essential to competitive provision of services. SBC’s performance should be audited until deemed complete and reliable.

³ *Proposed Conditions* at ¶¶ 3-7.

Moreover, the nature and design of the audit should remain within the Commission's control to ensure neutrality and completeness.

B. The "Remedies" Provisions are Unreliable and the Enforcement Mechanisms are Inadequate

The remedies provided by the proposed merger conditions document must be viewed with skepticism. A brief review of the history of the Bell Atlantic/NYNEX ("Bell Atlantic") merger more than explains the need for caution when reviewing BOC promises. In seeking regulatory approval for its proposed merger, Bell Atlantic made explicit commitments with specific completion timetables regarding key issues of concern to competitive providers (OSS interface implementation among them).⁴ Those commitments were not met, there was no mechanism for prompt Commission response to Bell Atlantic's noncompliance, and to this day, CLECs and consumers are paying the price.⁵

For SBC-Ameritech's commitments to be trustworthy, there must be severe costs to nonperformance. Allegiance notes, with approval, that the proposed conditions incorporate significant financial penalties for noncompliance. This is an encouraging indication that the Applicants understand that the commitments must be backed by serious penalties for nonperformance. However, Allegiance is not convinced that the proposed penalties and their implementation mechanism will prove effective.

⁴ *NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997).

⁵ Allegiance recognizes that Bell Atlantic has continued to work towards meeting the goals set as a condition for its merger; however, the lesson remains clear: in the absence of strong enforcement mechanisms, incumbents' promises, made to obtain regulatory approvals, tend to remain unfulfilled.

The proposed penalty structure is a complex matrix all by itself. Broad categories of incumbent obligations are itemized into a series of milestones. The financial penalties, on their face, appear considerable. Liquidated damages to CLECs and voluntary payments to a Commission-designated public interest fund are available for violation of the Federal Performance Parity Plan.⁶ Failure to meet individual OSS Enhancements milestones carries penalties of \$100,000 per business day.⁷

As usual, the devil is in the details. A careful walkthrough of the “OSS Enhancements and Additional Interfaces” section reveals a schedule packed with opportunities for delay at little or no cost. Typical of this is the penalty schedule for “development and deployment of uniform application-to-application interfaces and graphical user interfaces.”⁸

Phase 1 is completed when SBC-Ameritech issues its plan publicly.⁹ There is no standard by which to challenge the adequacy of that plan. Provided SBC-Ameritech issues some semblance of a plan – however inadequate – there will be no penalties.

Phase 2 is the collaborative process between the SBC and CLECs.¹⁰ The parties meet to reach written agreement upon the SBC-Ameritech plan. Should the parties be unable to agree upon that plan within one month, the CLECs have no right to arbitration. The Chief of the Common Carrier Bureau is presented with a copy of SBC-Ameritech’s plan and a list of unresolved issues. The Chief must then decide whether to order implementation of the SBC-Ameritech plan as presented or order the parties to binding arbitration. The arbitration process is

⁶ *Proposed Conditions* at ¶2.

⁷ *Id.* at ¶¶ 8-17.

⁸ *Id.* at ¶11.

⁹ *Id.* at ¶11(a).

¹⁰ *Id.* at ¶11(b).

not altogether reassuring as it is to be conducted before an “independent arbitrator” in consultation with subject matter experts chosen from a list supplied by SBC-Ameritech. In addition, the costs of the arbitration are to be split equally between SBC-Ameritech and the CLECs. This cost allocation does not change regardless of the arbitrator’s findings. Consequently, even if the arbitrator finds SBC-Ameritech clearly in the wrong, the CLECs will still bear half the costs of the arbitration. Meanwhile, with respect to implementation of the program, there will be no further progress until either SBC-Ameritech is “ordered” (permitted) by the Chief of the Common Carrier Bureau to implement its own plan or SBC-Ameritech receives the arbitrator’s decision. No penalties exist for Phase 2.

Phase 3 is the implementation of the plan resulting from Phase 2.¹¹ Phase 3 does not begin until (a) the CLECs agree to the proposed SBC plan, with nominal modification at best given the one month time frame; (b) the Chief of the Common Carrier Bureau reviews the SBC plan along with the unresolved issues and orders implementation of the plan; or (c) the arbitrator issues a final decision. The proposed timeline for Phase 3, triggered by completion of Phase 2, is eighteen months.¹² Failure by SBC to meet this deadline will only be addressed if either SBC fails to notify the Commission of completion or the CLECs successfully persuade the Chief of the Common Carrier Bureau to order binding arbitration. Again, the arbitrator’s subject matter experts are pre-ordained by SBC and, again, half the costs of arbitration fall upon the CLECs regardless of the arbitrator’s findings. The penalty for failure to meet the target date is \$100,000 per business day, paid to a Commission-designated public interest fund. However, these

¹¹ *Id.* at ¶11(c).

¹² As throughout the merger conditions document, there is a separate, later deadline for Connecticut. The substantial disparities in Connecticut’s timetable are not explained.

penalties “shall only be paid with respect to the period following the date on which (i) SBC-Ameritech acknowledges such a failure, or (ii) the arbitrator issues a final decision.”¹³

The result of this complicated milestone maze is that SBC-Ameritech can deliver an inadequate and altogether self-serving plan in Phase 1 without penalty. In Phase 2, SBC can delay sufficiently to force an arbitration (hoping meanwhile to persuade the Common Carrier Bureau Chief to order implementation on the company’s terms). Then, for half the costs of the arbitration, SBC can gain additional time through continued delay. Finally, in Phase 3, SBC can again deliver an inadequate program and notify the Commission of completion (hoping that no CLEC will challenge and successfully persuade the Chief of the Common Carrier Bureau to order arbitration). Should arbitration be ordered, SBC can delay throughout, absorb as a tolerable business expense half the costs of the arbitration and finally, at the additional cost of a few \$100,000 days, deliver something resembling the requisite product. An impressive amount of time can be used up in this process – and the pattern repeats throughout the proposal. The merger conditions proposal itself affords the company months and even years to finally fulfill its current obligations for the provisioning of CLECs. A sustained delaying tactic by the company could gain it considerably more time.¹⁴ Allegiance regrets the need to voice such pessimistic concerns, but the history of BOC compliance has been one of consistent noncompliance and the details of this proposal do not allay the legitimate CLEC fear of a continued albeit subtler BOC recalcitrance.

¹³ *Proposed Conditions* at ¶11(c).

¹⁴ The repeated inclusion of a seemingly high cap (\$10,000,000) subject to a finding of willful misconduct is less impressive when considered against the cumulative days at no penalty which the company can gain by simply playing its own schedule advantageously. Moreover, there is no provision for a higher penalty or an earlier application of penalties upon a finding of willful misconduct.

C. The “Most Favored Nation” Provisions are Overly Restrictive

SBC-Ameritech commits to make available to competitive providers within its region any interconnection arrangement or UNE which an SBC-Ameritech CLEC affiliate has obtained from an incumbent LEC.¹⁵ However, it extends that pledge only to arrangements and UNEs which the other incumbent has not previously made available to CLECs and only to those arrangements which its affiliate has obtained through arbitration. The limitation to “new” and arbitrated arrangements and UNEs is unexplained and unnecessarily restrictive. Interconnection arrangements and unbundled network elements facilitate the efficient sharing of telecommunications infrastructure so that a competitive market in telecommunications services may exist at all. If SBC-Ameritech is serious in this commitment, it should make available to CLECs in its region any interconnection arrangement or UNE which its CLEC affiliates has access to from other incumbents.

Similarly, the availability to any carrier within the SBC-Ameritech region of any agreement “voluntarily negotiated by SBC”¹⁶ is an appropriate step towards simplifying the interconnection agreement process. However, excluding from this availability any agreement which involved commission arbitration proceedings is unduly restrictive. There is no plausible reason to preclude competitive providers from adopting arbitrated agreements as well as negotiated agreements except that the former group may have more attractive terms and conditions for the CLECs. If SBC-Ameritech is truly committed to cooperative competition in its region, it should amend this provision to include all approved agreements.

¹⁵ *Proposed Conditions* at ¶51.

¹⁶ *Id.* at ¶52.

II. THE COMMISSION SHOULD ADOPT COMPREHENSIVE PERFORMANCE MEASURES WITH STRONG MEANINGFUL REMEDIES

Allegiance believes that the decisions made in this proceeding will largely determine the future of competition in the SBC-Ameritech region. As demonstrated above, the proposed standards are inadequate and incomplete. Many essential measures and timelines are simply missing from the proposal. Additionally, the allegedly beneficent most-favored-nation provisions, upon closer examination, are discovered to be mined with clauses which render them nearly worthless. Finally, the proposed conditions lack substantive remedies for competitive providers injured by SBC's noncompliance. To ensure that a post-merger SBC actually cooperates with the full introduction of competition within its region, the Commission should adopt appropriate performance measures, correct the most favored nation provisions to establish real equivalence of opportunity with respect to interconnection and UNE provisioning, and complete this revised package with a strong enforcement component.

A. The Commission Should Adopt the Texas Performance Measures for Application Throughout the SBC-Ameritech Region

Allegiance believes that the Texas Performance Measures represent the best available regimen of measures and timelines for use in the SBC-Ameritech region. The proposed conditions are borrowed from and, consequently, consistent with the complete Texas program. Additionally, the Applicants have accepted the Texas measures already in other proceedings. Finally, the measures are well-respected among CLECs.

1. The proposed merger conditions are actually an incomplete derivative of the Texas standards

Allegiance was pleased to see that for its proposed merger conditions, SBC-Ameritech borrowed from the Texas performance standards. However, the borrowing was selective and left out many components of those standards without rationale for the exclusion. While the company may have plausible reasons for the incomplete adoption of the Texas standards, Allegiance believes that such selective composition of commitments does a disservice to the rest of the industry, to regulators attempting to monitor compliance, and ultimately to consumers who bear the costs of an inefficient telecommunications market. A seamless comprehensive scheme of obligations and performance measures benefits all parties. The incumbent and competitive providers know with precision what their obligations and rightful expectations are with respect to all aspects of UNE provisioning and resale. Regulators can identify with specificity whether a carrier's performance meets the stated obligation.

2. The Applicants have accepted the Texas standards in two states already

Adoption of the Texas Performance Standards for the SBC-Ameritech region would not represent a radical departure from the company's current obligation in some parts of its region. Southwestern Bell ("SWBT") has agreed already to the Texas Performance Standards for its Texas operation. Additionally, SWBT has agreed to implement at least sixty of these same standards within Ameritech's Ohio operation. Clearly, then, the Texas standards are neither new nor entirely unpalatable to SBC-Ameritech.

As large incumbents expand their regions, consistency in their wholesale provisioning efforts should similarly expand. The alternative is a continuance of the present scenario in which competitive providers must negotiate repeatedly with the same incumbent

throughout the incumbent's region. The redundant negotiations and the resultant discrepancies among agreements reached impose a costly burden upon competitive providers and slow the growth of competition. There is no persuasive reason why SBC-Ameritech should not adopt one consistent set of commitments and terms throughout its region.

B. The Commission Should Adopt a Program of Strong Meaningful Remedies to Provide Effective Enforcement of the Adopted Performance Standards

Allegiance recommends that the Commission adopt a tiered penalty structure which will provide sufficient incentive for meaningful compliance. The initial penalty for "backsliding" on commitments should be an immediate reduction in rates that SBC-Ameritech may charge competitive providers for Competitive Checklist items, similar to the approach of the New York Public Service Commission. Thereafter, continued noncompliance would result in the imposition of a series of material fines, of increasing amounts, upon the company. These should be available for imposition both per day and per violation. The tandem calculation of penalties is essential. Penalties simply applied per day, irrespective of the number of violations, trivialize the effects of multiple violations upon the CLECs business operations and upon the end users. Moreover, they fail to provide the incumbent with any incentive to minimize the breadth of damages. At the same time, adoption of a per-violation penalty regimen carries similarly unfortunate effects. In such a scheme, once penalized for a violation, the company has no incentive to remedy the situation with any particular haste. Moreover, penalties applied only on a per-violation basis fail to recognize that the incumbent provider benefits incrementally for each additional day of delay while the competitive provider suffers measurable business losses for every day of nonprovisioning. In direct contrast, per-day penalties reflect the sizable economic realities of passing time and emphasize that the noncompliance in question is a completely

unacceptable breach of the company's obligations under state and federal law. Allegiance believes that this tiered approach will more effectively motivate SBC-Ameritech to fulfill its commitments on schedule. Initial noncompliance will have immediate repercussions and the incentive to delay will be eliminated by a steep schedule of quickly increasing fines.

C. The Commission Should Adopt Meaningful Most-Favored-Nation Standards to Ensure Real Competition Within the Proposed SBC-Ameritech Region

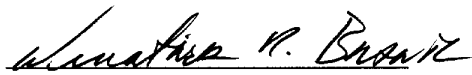
Real competition will only exist within the SBC-Ameritech region when all competitive providers have equal access to the full range of interconnection arrangements and UNEs. In order to achieve this goal, the Commission should correct the earlier-identified restrictions in the proposed most-favored-nation provisions. All CLECs should have access to any interconnection arrangement or UNE which SBC provides within its region, whether as a consequence of negotiation or arbitration. Similarly, all CLECs in the SBC region should have access to any interconnection arrangement or UNE available to SBC's CLEC affiliates, whether the SBC affiliate obtains it or not, whether it has previously been available to CLECs or not, and whether it has been obtained through negotiation or arbitration.

CONCLUSION

The proposed SBC-Ameritech merger raises a great many concerns for competitive carriers and for the regulatory bodies mandated to foster and protect competition in the telecommunications market to the benefit of consumers throughout the nation. Allegiance believes that with the implementation of clear measurable standards for performance by SBC-Ameritech within its region, backed by a substantive enforcement mechanism, many of these concerns will be ameliorated. Therefore, Allegiance recommends that the Commission, as a

condition of merger approval, require SBC-Ameritech to implement the Texas Public Utility Commission performance standards on a regionwide basis, subject SBC-Ameritech to effective enforcement mechanisms for failure to meet those standards and require SBC-Ameritech to implement a comprehensive most-favored-nations policy that would allow a CLEC to take advantage of provisions in any approved interconnection agreement to which SBC-Ameritech or its CLEC affiliate is a party, whether the agreement is voluntarily negotiated or arbitrated.

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